

**STATE OF VERMONT
VERMONT SUPREME COURT
AUGUST TERM, 2010**

**Order Promulgating Amendments to the Vermont Rules of Probate
Procedure and Forms and Administrative Order No. 18**

Pursuant to Chapter II, Section 37, of the Vermont Constitution and 12 V.S.A. § 1, it is hereby ordered:

1. That the emergency amendment of V.R.P.P. 77(d), allowing the Supreme Court to provide for methods of notice by the register that would reduce the cost of service, promulgated by the Court on December 17, 2008, effective January 1, 2009, be made permanent.
2. That Rule 80.8 of the Vermont Rules of Probate Procedure be added to read as follows:

**RULE 80.8. ACCOUNTING BY AN AGENT UNDER A POWER OF
ATTORNEY**

(a) Petition. An agent named under a durable power of attorney created as provided in 14 V.S.A. § 3508 who has reason to believe that the principal has become incompetent and that no guardian has been appointed may file a petition in the probate court for the district in which the principal resides seeking review and approval of the accountings of the agent. The petition shall be accompanied by the following:

- (1) the entry fee;
- (2) a copy of the power of attorney;
- (3) the accounting or accountings for which the agent seeks review and approval;
- (4) an inventory of any assets of the principal under the control of the agent;
- (5) the names and addresses of the interested persons listed in Rule 17(a)(3)(i)-(v).

(b) Notice. Upon receipt of the petition, the court shall set a date and place for hearing and shall send notice thereof, together with a copy of the petition and the accounting or accountings for which approval is sought, by appropriate methods specified in Rule 4 to the interested persons named pursuant to paragraph (a)(5) of this rule and to such other persons as the court may direct. The notice of hearing shall inform each recipient of the necessity to file a timely written objection if the recipient desires to contest the accounting.

(c) Accounting; Appraisal. The provisions of Rule 66(c)-(f) govern the form of the accounting, the filing of an interim accounting, the filing of objections, and the appraisal of the principal's assets.

(d) Hearing. At the hearing, if the court determines that no guardian has been appointed and that the agent has reason to believe that the principal is incompetent, the court shall proceed to review the accounting presented by the agent. The court may appoint a guardian ad litem or attorney to represent the interests of the principal. If no timely written objections have been filed and the court finds that the property interests of the principal are adequately protected, the court may allow a verified accounting without further hearing. If timely written objections have been filed or other questions are raised concerning the adequacy of protection of the principal's property interests, the court, after hearing, shall determine whether to allow or disallow the agent's accounting or grant other appropriate relief.

(e) Prior and Future Accountings. At the request of the petitioner or any party, or on its own motion, the court may order that the agent provide

(1) copies of any prior accountings provided by the agent on request of the principal, or as specified in the power of attorney, pursuant to 14 V.S.A. § 3505(a)(10) or pursuant to a petition filed in accordance with 14 V.S.A. § 3510; or

(2) future accountings for a period, and according to a schedule, ordered by the court.

(f) Application of Rules. The Rules of Probate Procedure apply to proceedings governed by this rule, except as otherwise provided in this rule or by applicable statute.

Reporter's Notes

Rule 80.8 is added to implement the grant of jurisdiction to the probate courts in 4 V.S.A. § 311, as amended by Act 135 of 2001 (Adj. Sess.), § 1, over "accountings of attorneys in fact where no guardian has been appointed and the agent has reason to believe the principal is incompetent." That grant of jurisdiction was part of the enactment of 14 V.S.A. §§ 3501-3516, providing for creation, implementation and enforcement of powers of attorney. The purpose of the jurisdiction is to allow the "agent"—i.e., the attorney in fact—to protect himself or herself in a situation where the principal is not able to call for an accounting but issues may arise concerning the agent's handling of the principal's funds or other property.

Rule 80.8(a) provides for a petition for an accounting by an agent under a durable power of attorney—one that,

pursuant to 14 V.S.A. § 3508, is not affected by the subsequent disability or incapacity of the principal. (A power of attorney not executed under that provision terminates on the principal's disability or incapacity, pursuant to 14 V.S.A. §3507(a)(4).) The petition is to set forth the agent's belief that no guardian has been appointed and that the agent has reason to believe that the principal is incompetent. The entry fee, a copy of the power of attorney, the accounting or accountings for which approval is sought, the inventory of any assets of the principal held by the agent, and a list of interested persons similar to that in Rule 17(a)(3) covering adult involuntary guardianships are to be filed with the petition. The petition is to be filed in the probate district where the principal resides by analogy to statutory venue provisions for probate guardianship proceedings. See 4 V.S.A. §§ 311a(7)(A), (9)(B), (13)(B).

Rule 80.8(b) provides for notice of the petition and hearing in accordance with Rule 4. The final sentence, taken from Rule 66(b), is intended to alert any recipient of notice as to the need to file a timely written objection. The objection is "timely" if it is filed at least three days before the hearing as provided in Rule 66(e), incorporated by Rule 80.8(c).

Rule 80.8(c) incorporates key provisions of Rule 66 that govern the form of the accounting, the filing of interim accounts, the necessity for timely written objections, and the authority to employ an appraiser on the agent's or the court's own motion.

Under Rule 80.8(d), at the hearing the court must make an initial determination that no guardian has been appointed and that the agent has reason to believe that the principal is incompetent. The proceeding is not a competency hearing as such, so it is only the agent's reasonable belief—a kind of probable cause—not an absolute finding of incompetency. If the court makes these preliminary findings, it has discretion to appoint a guardian ad litem if there appear to be concerns about the adequacy of the agency's ability to protect the principal's interests. If there are no such concerns, whether in the eyes of the court or a G.A.L. if one has been appointed, and no timely written objections have been filed, the court, as under Rule 66(e), may allow the accounting without further hearing. If there are doubts about the adequacy of the agent's handling of the principal's funds or property, or objections have been filed, the court must hold a hearing to determine whether to allow the accounting. The court may grant other appropriate relief,

including appointment of a guardian under 14 V.S.A. § 3509 or, as a matter of inherent power, the same relief that the superior court may grant under 14 V.S.A. § 3510.

Rule 80.8(e) permits the court on its own motion, or that of the agent or another party, to order the submission of prior accountings rendered by the agent on the principal's property and to provide for future accountings on a schedule to be determined. The question whether to exercise this power would be determined on the basis of the nature of the principal's disability and the likely duration of the agent's authority.

Rule 80.8(f) makes clear that other provisions of the Probate Rules governing the manner and timing of an accounting apply to accountings under this rule. See Rule 66(b)-(e).

3. That the emergency amendment of V.R.P.P. Form 72 to implement recent amendments of 14 V.S.A., ch. 111, enacted by Act 186 of 2007 (Adj. Sess.) effective July 1, 2008, promulgated December 17, 2008, effective January 1, 2009, be amended to read as follows and be made permanent (deleted matter struck through; new matter underlined).

FORM 72. PETITION FOR APPOINTMENT OF GUARDIAN FOR AN ADULT PERSON

STATE OF VERMONT
DISTRICT OF _____, SS.

PROBATE COURT
DOCKET NO. _____

GUARDIANSHIP OF: _____
OF: _____

PETITION FOR APPOINTMENT OF GUARDIAN FOR AN ADULT PERSON

The undersigned (petitioner) represents that it is necessary that a guardian be appointed for the following individual (respondent):

Name	Residence Address	DOB
_____	_____	_____

(Current location if different from above) _____

In support of this petition, the undersigned provides the following:

A. *The name and address of anyone known to the petitioner who is:*

Currently serving as a guardian (Attach a copy of appointment)

Currently named as Agent in an Advance Directive document (Attach a copy)

Currently acting as Agent under a Power of Attorney document (Attach a copy)

B. *The petitioner's relationship to the respondent is (check one):*

- friend/neighbor public official relative _____
 social worker physician
 other (attach explanation) _____

C. *The respondent is alleged to be a person in need of guardianship, is at least 18 years of age or will be within four months of the filing of the petition, and is disabled from (check one):*

- Mental Illness Developmental Disability
 Traumatic Brain Injury Other _____

D. *List specific reasons with supporting facts as to why guardianship is sought:*

E. *The petitioner requests the following powers (check all that apply):*

- To exercise general supervision over the person under guardianship, including care, habilitation, education, and employment.
 To give or withhold consent to medical or dental treatment, subject to the provisions of 14 V.S.A. § 3075, and any constitutional rights of the person under guardianship to refuse treatment;
 To exercise financial supervision over the income and resources of the person under guardianship;
 To approve or withhold approval of any contract, except for necessities, which the person under guardianship wishes to make;

- To approve or withhold approval of the sale or encumbrance of real property of the person under guardianship subject to the provisions of 14 V.S.A. §.2881 et seq.;
- To obtain legal advice and to commence or defend against court actions in the name of the person under guardianship.

F. *Have other alternatives to guardianship been considered?* If yes, please explain:

G. *Name and address of proposed guardian:*

Telephone () _____

The undersigned understands that the Court must order an evaluation of the respondent to be performed by someone who has specific training and demonstrated competence to evaluate a person in need of guardianship. The evaluation shall be completed within 30 days of the filing of the petition with the court unless the time period is extended by the court for cause.

Name and address of evaluator:

The undersigned understands that the Court must appoint an attorney to represent the respondent in this proceeding.

Name and address of the respondent's attorney, if any:

The undersigned understands that it is his or her responsibility, prior to filing this petition, to obtain from the Court the forms necessary to give his or her consent to background checks required by law and to attach those forms, properly signed, to the petition as Attachment 5.

Dated _____

Signed _____, Petitioner
Print name _____

Address _____

Telephone () _____

I CONSENT TO BE APPOINTED GUARDIAN OF THE ABOVE RESPONDENT

Signature of proposed guardian: _____

Date: _____

Attachments as follows:

1. ~~\$50.00 e~~Entry fee in the amount required by 32 V.S.A. § 4234, payable to _____ Probate Court
2. Statement of proposed respondent's assets and income (Form No. 73)
3. List of interested persons (Form No. 75)
4. Copy of advance directive and/or any power of attorney
5. ~~You may also be required to submit~~ Signed consents necessary for a complete background check.

Guardianship shall be utilized only as necessary to promote the well-being of the individual and to protect the individual from violations of his or her human and civil rights. It shall be designed to encourage the development and maintenance of maximum self-reliance and independence in the individual and only the least restrictive form of guardianship shall be ordered to the extent required by the individual's actual mental and adaptive limitations. The state of Vermont recognizes the fundamental right of an adult with capacity to determine the extent of health care the individual will receive. 14 V.S.A. § 3060.

Reporter's Notes—2010 Amendment

An emergency amendment to Form 72 was originally adopted to implement recent amendments of 14 V.S.A., ch. 111, enacted by Act 186 of 2007 (Adj. Sess.), which took effect on July 1, 2008. The amendment is now made permanent. The form has been further revised to substitute the statutory citation for the amount of the entry fee, rather than the specific amount; to add a statement advising the petitioner of the requirement to obtain consents for background checks; and to clarify that

Attachment 5 consists of the signed consent forms.
Simultaneous conforming or related amendments have been made to Forms 74 and 80.

4. That Form 74 of the Vermont Rules of Probate Procedure be amended to read as follows (deleted matter struck through; new matter underlined):

FORM 74. PETITION TO APPOINT VOLUNTARY GUARDIAN FOR AN ADULT PERSON

* * * * *

I request that the guardian have the following powers (check applicable requests):

- 1. To exercise general supervision over me, including care, habilitation, education, and employment;
- ~~5.~~ To give or withhold consent to ~~surgery or other medical procedures or dental treatment~~, subject to the provisions of 14 V.S.A. § 3075, and any constitutional right of mine to refuse treatment;
- ~~4.~~ To exercise ~~general~~ financial supervision over my income and resources;
- ~~2.~~ To approve or withhold approval of any contract, except for ~~necessaries~~ necessities, which I wish to make;
- ~~3.~~ To approve or withhold approval of my requests to sell or ~~in any way~~ encumber my real or personal property, subject to the provisions of 14 V.S.A. § 2881, et seq.;
- ~~6.~~ To ~~receive, sue for, and recover debts and demands due me, to maintain and defend actions or suits for the recovery or protection of my property or person, settle accounts, demands, claims and actions at law or in equity against me, including actions for injuries to my property or person, and to compromise, release, and discharge the same on those terms as the guardian deems just and beneficial to me~~ obtain legal advice and to commence or defend against court actions in my name.

Reporter's Notes—2010 Amendment

Form 74 is amended to conform the list of powers requested by the petitioner to those requested by a petitioner for a guardian for an adult person in Form 72, which reflect recent statutory amendments. See Reporter's Notes to simultaneous amendment of that form.

5. That the emergency amendment of V.R.P.P. Form 80 to implement recent amendments of 14 V.S.A., ch. 111, enacted by Act 186 of 2007 (Adj. Sess.) effective July 1, 2008, promulgated December 17, 2008, effective January 1, 2009, be amended to read as follows and be made permanent (deleted matter struck through; new matter underlined).

FORM 80. APPOINTMENT OF GUARDIAN

STATE OF VERMONT
DISTRICT OF _____, SS.

PROBATE COURT
DOCKET NO.

IN RE THE GUARDIANSHIP OF

OF _____

APPOINTMENT OF GUARDIAN

For the reasons stated in the findings and conclusions, the Probate Court for the District of _____ appoints _____ of _____

- as guardian for the above named person (with all powers)
- as limited guardian for the above named person (with limited powers)

You are granted the following powers with respect to this guardianship:

- 1. To exercise general supervision over the person under guardianship. This includes care, habilitation, education and employment, and choosing or changing the residence subject to the requirements of 14 V.S.A. §§ 2691, 3073 and 3074. 14 V.S.A. § 3069(c)(1)
- 2. To give or withhold consent to medical or dental treatment, subject to the provisions of 14 V.S.A. 3075 and any constitutional right of the person under guardianship to refuse treatment. 14 V.S.A. § 3069(c)(2)
- 3. To exercise financial supervision over the income and resources of the person under guardianship. 14 V.S.A. § 3069(c)(3)
- 4. To approve or withhold approval of any contract, except for necessities, which the person under guardianship wishes to make. 14 V.S.A. § 3069(c)(4).
- 5. To approve or withhold approval of the sale or encumbrance of real property of the person under guardianship subject to the provisions of 14 V.S.A. § 2881 et seq. 14 V.S.A. § 3069(c)(5).
- 6. To obtain legal advice and to commence or defend against court actions in the name of the person under guardianship. 14 V.S.A. § 3069(c)(6).

In discharging your obligation, you shall:

- file with the court within 30 days a true inventory of all the real and personal property of the person under guardianship.
- render a personal status report on each anniversary of your appointment date.
- manage and dispose of the estate and effects according to law and for the best interests of the person under guardianship
- render an account of the property of the person under guardianship each year on the anniversary of your appointment ~~or~~ and at any other time the court may require.
- upon expiration of this appointment, render and settle the account and pay over and deliver the estate and remaining effects to persons legally entitled to same.
- provide public notice of the limitation of the person under guardianship's ability to contract if so ordered by the court. (sSee Rule 80.1)

The powers, duties and responsibilities of persons appointed as fiduciaries are detailed in the pamphlet entitled "Instructions to Guardians" which is furnished with this appointment. All guardians are required to perform their duties according to these instructions, the rules of probate procedure, and the laws of Vermont.

The guardian shall exercise supervisory powers in a manner which is least restrictive of the personal freedom of the person under guardianship consistent with the need for supervision.

Dated _____ Signed _____, Judge
 (SEAL) Probate Court, District of _____

Reporter's Notes—2010 Amendment

An emergency amendment to Form 80 was originally adopted to implement recent amendments of 14 V.S.A., ch. 111, enacted by Act 186 of 2007 (Adj. Sess.), which took effect on July 1, 2008. The amendment is now made permanent. The form is further revised to make clear that the guardian's account must be rendered annually and at any other time required by the court.

6. That the emergency amendment to Administrative Order No. 18 to establish a mechanism for the Administrative Judge to designate which probate judge will be assigned to perform the duties of an incapacitated probate judge, promulgated on January 13, 2009, effective on that date, be made permanent.

7. That the amendment to Form 74 of the Vermont Rules of Probate Procedure is a technical amendment to conform the form to the simultaneous amendment of Form 72, for which the notice and comment procedures of Administrative Order No. 11 are hereby dispensed with in accordance with § 9 of that order.

8. That these amendments are prescribed and promulgated effective on October 18, 2010. The Reporter's Notes are advisory.

9. That the Chief Justice is authorized to report these amendments to the General Assembly in accordance with the provisions of 12 V.S.A. § 1, as amended.

Dated in Chambers at Montpelier, Vermont, this 17th day of August, 2010.

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice